INTELLECTUAL PROPERTY AND SOCIAL JUSTICE

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ABSTRACT

The main goal of this chapter is to explore the relation between intellectual property and social justice. Particularly, the aim is assessing the impact of the former on the shaping of the latter. Hence, and after summarising a possible approach to social justice, the special characteristics of intellectual property goods as semi-public goods will be recalled. In this realm, we will explore the paradox of such goods being naturally non-rival and non-excludable, while its protection enables the right holder to effectively prevent third parties from using them within a certain time frame. We then follow to analyse the rationale of intellectual property. Here, we will start by alluding to the incentive to create and the promotion of innovation as commonly referred reasons for the very existence of intellectual property. However, we will call upon justice considerations as well, showing that intellectual property has in its core social justice concerns and that its roots go far beyond any economic construction. We will finally refer to limitations to intellectual property rights and outline some conclusions about the possible relation between social justice, economic efficiency and intellectual property.

I – INTRODUCTION

The liaisons between intellectual property and social justice are uneasy. One might consider either economic efficiency or social justice as justifications for intellectual property rights. Both options are quite intuitive – if one's creation generates positive externalities which will benefit society, then one should be able to internalize those externalities, i.e., to recoup one's investment. This assumption addresses efficiency or *ex ante* concerns, but also fairness or *ex post* ones: in fact, a fair reward for one's effort is an incentive to generate more welfare in the future. One way to achieve

these aims would be to grant proprietary rights, following a Coasean perspective of attribution of rights[1].

However, whether intellectual property rights are up to the task of promoting such efficiency and fairness is another problem. This complex trade-off is reflected on recent debates. For example, in relation to pharmaceuticals, it is necessary to balance incentive to innovate and patent protection with the need to provide access to drugs at affordable prices. Similarly, in the field of copyright and neighbouring rights, one must also weight the interests of musicians and the music industry against those of consumers and users.

The goal of this chapter is not to develop a theory about the differences between the various intellectual property rights. Therefore, the main focus will be on the common core of such rights, and not on their differences. The interest here is to assess how that main core is linked to notions of social justice, and particularly how the latter influences the former. Further, another challenge ahead is to determine if and how fairness and efficiency can be conciliated.

Part II of this chapter will focus on a possible concept of social justice. Part III will address the definition of intellectual property goods and Part IV will describe the rationale of intellectual property. Before outlining some conclusions, the role of limits to intellectual property will be discussed.

II – AN APPROACH TO SOCIAL JUSTICE

It goes without saying that social justice is but a part of the broader concept of justice[2]. Social justice entails a part of *suum cuique*, of giving to one what to one is due, in a just (but not necessarily equal) proportion of benefits and burdens[3],[4]. As much as the basic principle of fairness instinctively makes sense, it has been argued that the very

[1] Coase 1960, *passim*.
[2] Miller 1979, p. 17 ff..
[3] *Eiusdem, ibidem*.
[4] What is called here “just proportion” can also be described as “principle of conditional equality”: see Lane 1996, p. 230.

foundations of *suim cuique* would be of a circular nature, for to decide what to one is due presupposes a prior conception of justice[5].

There are several criteria that can be brought forward to define what that prior conception of justice should be based upon. Despite the deficiencies pointed out to the standard of merit[6], it is submitted that it is fully applicable in given situations. In other words, it is not the intention of the author of this chapter to assume merit as a transversal criterion to be used when deciding whether a circumstance is just or unjust. Rather, merit ought to be resorted to whenever there is a human action or effort mirrored upon a certain result.

There are of course benefits and burdens which derive from social condition, race or age, just to name a few, and obviously merit cannot be of much use for a conceptualisation in that domain. However, when a will drives a human action or effort into the production of a specific result, merit should be taken into consideration.

On the other hand, one might object to this partitioned view by claiming that it is not compliant with the universal nature that should underlie any valid criteria. But is there really a criterion of justice that can be applied to situations influenced by a man's will and actions and situations out of his control alike? Or to put it another way, should such criterion be considered a valid one? The answer to both queries ought to be negative. Justice that judges men – men's actions, men's intentions – is a different reality than justice that is primarily concerned with inherently natural affairs. What is proposed here is to apply merit as a factor within the former. This merit-based concept of justice is surely a niche one; but, it is this author's view, a valid one nonetheless.

Furthermore, merit does not exclude other models or criteria. It should be applicable to a certain kind of situations, but it is independent of other abstract notions, e.g., the one concerning equal distribution of benefits to address basic needs. That is, a different type of theoretical construction will have to be drawn to deal with the problem of a just distribution of resources and benefits that relate to the basic needs of the individual and/or that are merit-independent. A clear example can be put forward to illustrate this dichotomy: a just distribution of resources at the level of basic needs

[5] Kaufmann 1970, p. 58.
[6] *Eiusdem*, pp. 62-63.

might imply that there should be a minimum wage that allows people to acquire essential goods and services. A distribution of resources based on merit could still go beyond that level by determining that, from that minimum on, any increase of salary should be based on merit alone.

Another problem is yet deciding what merit is. Merit in this context is invoked as the cause for reward, which should be proportionate to merit. But that threshold is not an easy one to determine, both quantitatively and qualitatively. In fact, there is not a straightforward definition of what merit might be, probably because merit itself depends on the particular system of values of a society. Whatever that system, however, it must be underlined that a merit-based justice rejects the notion of absolute equality, the latter standing on the premise that benefits are equal for everyone independent of achievements, labour or effort – i.e., independent of merit.

Current intellectual property systems acknowledge merit in a myriad of forms, none of which considers the merit in the process conducive to the final result. The legal framework does not perform a judgement regarding the amount of time and effort one has taken to write a book or to create a new drug. Ultimately, what matters is the final result and whether it complies with certain requirements. It can certainly be argued that intellectual property systems are unfair in that way, forasmuch as they disregard the main feature of an intellectual good, i.e., the effort or labour. In affording a right over an intellectual good, and provided that such good meets a set of mandatory requirements, the legal system concerned will not differentiate if it took the prospective right holder one month or ten years to create that good – which, of course, can be unfair towards other creators or innovators whose level of effort or labour was higher.

The previous argument can be rebutted in two ways. First, in practical terms, and assuming that the method to ascertain the exact level of effort or labour is at all feasible, it is costly. More precisely, it implies administrative and time costs. These costs will, in the end, be indirectly reflected upon tax payers – including prospective right holders. Second, using a best choice approach, a different solution would create other types of unfair situations as well. Let us imagine that it would be possible to award rights according to the real effort or labour. If more effort means better rights, the naturally talented, who take less time to invent or create, would be left with less or worse rights. So far not so bad, since one can assert that a natural talent, being something that one is

born with, is merit-independent. However, it is possible that a naturally talented person has made some effort to develop that talent overtime, and that that effort is not being accounted for. But more importantly, this solution would cause the naturally talented to not take the initiative to create or innovate, either because it would simply not pay off or due to the feeling of unfairness the solution can create. That would contend with the well being of the society as a whole which, even though not being the central focus of a merit-based theory, cannot be entirely discarded.

All in all, the definition of merit according to the result accomplished is possibly the best procedure. It combines merit with the global welfare of the society and it is also more objective and therefore less vulnerable to unfair outcomes. It follows therefrom that merit is assessed by the reward. Merit is not being used to define the reward that ought to be given; instead, the reward is used to define the level of merit, by establishing that those who are able to get the reward (because they met the requirements it demands) are so due to merit, i.e., to the effort or labour they put in achieving the reward.

III – INTELLECTUAL PROPERTY GOODS

A definition of what an intellectual property good might be is demanded before one can go any further. The boundaries of this concept are not well defined throughout the various jurisdictions; there are some concepts that can fall within the definition of intellectual property depending on the country or even on the doctrine. It is the case of personality rights.

Generally, intellectual property goods can be described as creations of the mind. Intellectual property rights are proprietary rights which have as a subject an intellectual property good, affording protection to their respective creator. Importantly, the proprietary rights are related to the immaterial creation, rather than being attached to the tangible medium where that creation reveals itself.

One can safely assume that there are at least four different types of intellectual property rights: patents, designs, trademarks and copyright. It is said safely since these

four rights are statutory law in most countries and they are part of a few international and regional treaties and conventions[7].

Patents protect inventions which fulfil certain requirements. These depend on the specific patent system, but usually they might come down to industrial application, novelty, inventive step or non-obviousness and patentable subject-matter. The patent gives its creator the exclusive right to prevent third parties from exploiting the invention without his consent. However, this exclusivity is also limited in time – the regular time span is twenty years, after which the invention becomes part of the public domain.

Designs are another type of intellectual property. They relate to the appearance or aesthetics of useful articles, for example furniture or clothing. Similarly to patents, designs are only protected if certain requirements are met. Again, these might depend on the specific jurisdiction, but generally a design shall be protected if it is novel and has individual character. Designs are also called "industrial designs", as they are intended to be reproduced industrially. The design grants its owner, upon registration, the exclusive right to exploit it and to prevent third parties from exploiting it without his consent. However, just like patents, this protection is also limited in time – depending on the country, it can normally vary between 10 to 25 years.

Trademarks are graphically represented signs used to distinguish the goods or services of one undertaking from those of other undertakings. Such signs can range from words to designs. The owner of a trademark has the exclusive right to use the mark and to prevent third parties from using that mark or a confusingly similar one without his consent. The period of protection can potentially be indefinite, so long as the respective owner renews it.

Copyright protects the artistic and literary expression. The authors of literary and artistic works such as books, music or paintings are thus entitled to certain exclusive rights, namely reproducing or distributing their work. Alternatively, they can authorise a third party to exercise those rights. However, such authors are not given any right over the original idea underlying their work, as copyright only protects the expression of that idea. Nevertheless, the scope of the rights granted to the creator is quite broad. The

[7] See, for example, Berne Convention for the Protection of Literary and Artistic Works, Hague Agreement Concerning the International Registration of Industrial Designs, WIPO treaties or Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

author is entitled to economic rights, which allow him to earn income for the use of his work. Yet, in many jurisdictions, moral rights are also bestowed upon the authors of copyrighted works. Such rights show a close connection with the author's personality – e.g., they usually amount to the right to claim authorship (so-called "right of paternity") and to the right to prevent any modification of the work which could cause damage to the author's reputation (also known as "right of integrity"). There is also another fundamental difference between economic rights and moral rights: whereas the former last at least until fifty years have passed since the death of the author (depending on the country it can last even longer), the former are eternal.

There is a common core to these rights: they all take something away from the public domain, thus creating a proprietary, exclusive sphere. This is done artificially, i.e., through the effect of the law, because intellectual property is in its very essence a public good: it is non-rival and non-excludable. Unlike physical property, it is non-rival forasmuch as it is possible for an unlimited number of individuals to use it simultaneously[8]. On the other hand, the non-excludability relates to the fact that, once an intellectual property good is created, it is not possible to exclude others from using it[9] – that is, of course, absent any kind of artificially-created protection as the one examined.

Since intellectual goods bear characteristics of public goods, they are also subject to the respective negative consequences: namely, the fact that the investment and production costs of the good are superior to the expected return, because no one will pay for a good that one can get for free. Logically, this scenario keeps producers from manufacturing public goods. In what concerns intellectual goods, this problem was solved exactly by creating intellectual property rights over such goods[10].

It is also noteworthy that the main characteristics of intellectual property goods pointed above are intrinsically linked to the fact that, despite their diverse scope and purpose, they are immaterial. In other words, one cannot properly own something which is not palpable. Hence, the law must step in by creating proprietary rights in what was before a natural public domain.

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[8] Moore 2004, p. 105.
[9] Muffatto 2006, p. 26
[10] Demuijnck 2008, pp. 146-147.

Because of the process of artificially creating proprietary rights over intellectual property goods, they cannot be described as pure public goods. In fact, the protection of intellectual property goods gives the respective owner the exclusive right to prevent others from using the good. Hence, they are best described as semi-public goods or club goods[11], i.e., public goods in relation to which scarcity is created and thus goods that bear features of both public and private goods.

IV – THE RATIONALE OF INTELLECTUAL PROPERTY

There are two important theories that focus on the rationale of intellectual property rights: the natural rights approach and the economic one.

Economic justifications for intellectual property concentrate on the incentive to produce or make available a certain type of goods (i.e., intellectual ones). This can take the form of stimulating the creation and the promotion of innovation (in the case of copyright, designs and patents), as well as of correcting market failures, such as information asymmetries (in the case of trademarks)[12],[13]. This reasoning is both evident and valuable. Indeed, and as a general rule, it is logical that the creator or innovator will be more willing to create or innovate if he is able to recoup his investment (specifically, the investment in creation or innovation). For instance, a patent will give an incentive for further innovation (because the inventor will eventually receive some revenue on account of the commercialisation of his invention) and, at the same time, enable disclosure of the patented invention (so that others can build on the technology). Likewise, copyright will both give an incentive for further creations and enhance cultural development.

Due to the specific characteristics of intellectual property goods described in the previous chapter, such creator or innovator will primarily be able to be compensated through the attribution of a right. This is the instrument which will allow him to efficiently exclude others from using the intellectual good. Consequently, he has the

[11] Jussawalla 1992, p. 30 ff.
[12] Thumm 2000, p. 31.
[13] See, for example, Towse 2001, p. 8 ff. (on the economic justification of copyright); Kitch 1977, p. 275 (on the economic justification of patents); or Ramello & Silva 2006, p. 5 ff. (on the economic justification of trademarks).

incentive to generate creations or innovations, which in turn will represent an added value to society in general. For example, a writer will have an incentive to write a book if he knows that he will be profiting from its sale, just as a manufacturer will be encouraged to produce and sell a certain type of goods – and society will benefit from the existence of that book and from the availability of tradable goods. This is, in economic terms, efficient[14], since it arguably avoids the underproduction of intellectual goods.

However, it is acknowledged that law is not only concerned with efficiency[15]. There are some notions of fairness that should be taken into consideration as well[16], forasmuch as law can be seen as the "just execution of justice"[17].

The doctrine of the English philosopher Locke is many times invoked to justify the grant of intellectual property rights[18]. He put forth a new dogmatic approach of property, somehow carved out of natural law and justice arguments: every man should be the proprietor of the product of his labour[19]. According to Locke, if one puts his labour and efforts into something which is either common property or nobody's property, then the result of such endeavour should be his to take. Arguably, Locke's thought is applicable to intellectual property inasmuch as the underlying material of an intellectual property right – an idea or a concept – can be said to be common or no one's propriety. Consequently, if one's intellectual labour contributes to shaping an idea or concept so that it turns into an intellectual good – say, a book - , then one should be entitled to have some kind of proprietary right over this result[20].

One might continue to argue that ideas are free, depicting them as something ethereal that lies around for everyone to use and for no one to own. Following that line of thought, it would be unfair for someone to claim any kind of property right over them, even if this is done indirectly through the grant of a proprietary right over a "laboured result".

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[14] The term efficiency is used here as a synonym for wealth maximization – Salzberger 2006, p. 37.
[15] Sunstein 1997, p.44.
[16] Dorff 2002, p. 898, argues that economic analysis is but a first step with regard to policy making and that one further has to consider "fairness, justice (…) and all other values or systems of belief".
[17] Homem 1998, p. 591.
[18] See, *inter alia*, Strowel 1993, p. 183 ff.; Bainbridge 2007 p. 347; Moore 2004, p. 103 ff.;
[19] See Locke 1976, p. 14 to 27.
[20] Fisher 2001, p. 4.

Yet, one can refute that argument by holding that intellectual property rights do not intrinsically entail an appropriation of ideas per se. In fact, a work of authorship or an invention are build on ideas. Still, they represent a step further, insofar as they imply an intellectual effort. While ideas might be a common property of humankind, the creator or inventor used his labour to shape them into a concrete good. For example, the tragedy of Romeo and Juliet would be copyrightable, but it would not prevent any other creator to write a novel about a doomed relationship between two lovers.

This Lockean justification is obviously linked to the merit-based justice. The result of a man's labour should be his property because it is his natural right – that is, because it is fair from the perspective of a merit-based justice, which in the end rewards one's effort or labour (or at least the result achieved because of one's effort and labour).

As hinted before[21], it is submitted that these approaches are not self-excludable. On the contrary, they are complementary, in that they are directed towards different moments in time. Before any creation comes into being, and in order for it to exist, incentives must be granted to prospective creators or innovators: this is the utilitarian perspective, which works from an *ex ante* perspective. Once a creation has taken place – and provided it meets the requirements laid down in the law – the reward theory, working from an *ex post* viewpoint, has its primal role.

Further, it can even be held that both theories are intertwined: the utilitarian theory presupposes that a reward is in fact given to those who create, otherwise the incentive would loose its strength; and the reward theory presupposes a prior incentive to create, the result of which will be the cause for the reward itself.

However, the fact that one can find traces of fairness and efficiency in the current system of intellectual property rights does not mean that the regime of rights per se reflects such concerns. Accordingly, the next few lines will be dedicated to that dilemma.

[21] See INTRODUCTION.

V – LIMITS TO INTELLECTUAL PROPERTY RIGHTS AND THEIR ROLE IN THE REALM OF SOCIAL JUSTICE

In the previous chapter the underlying reasons for the existence of intellectual property as a system or abstract scheme were analysed. There, it was concluded that two different sets of justifications for the existence of intellectual property rights can be pointed out. Hence, at what may be called the macro intellectual property level, the rights of the general public on the one hand and those of creators and inventors on the other seem to have struck hands on a delicate balance.

Nevertheless, even when foundations are set, one must try to assess how the system works at a micro intellectual property level. In other words, one must consider if and how efficiency and fairness can be managed so as to have the exact – or should we say possible? – measure of each one of them in the actual property rights and their respective exercise.

Establishing the limits of the creator's or the inventor's control in order to meet the goals of the whole system of intellectual property is an almost impossible task to accomplish[22]. Nevertheless, intellectual property rights are limited in a number of ways, namely duration and scope. E.g., the economic rights in copyright are valid until seventy years have passed since the death of the author; a patent is valid for twenty years; and so forth[23].

Specifically with regard to scope, each intellectual property right bears its own set of exceptions or limitations, the content of which will frequently vary from country to country. An eloquent example of an exception common to most intellectual property rights is private and/or non-commercial use. This usually implies a use that in normal circumstances would encompass an exclusive right of the right holder. However, since that use is performed in a private sphere, the law leaves such activities out of the field of exclusivity.

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[22] Sharing this view in what copyright is concerned, Breyer 1970, p. 286..

[23] Even when an intellectual property right is potentially eternal, there are still certain conditions that must be met for it to be maintained – for instance, a trademark is valid only for a short period of time (e.g., ten years), although it can be renewed indefinitely provided that the respective requirements are fulfilled.

Limitations to intellectual property rights can have different rationales. On the one hand, economic theories underline that limitations are necessary to deal with transaction costs. As illustrated by Coase[24], these amount to "discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed and so on". Hence, if certain uses are regulated by law in order to make them free and independent of the right holder's consent, such costs would disappear.

In addition, it has been pointed out as well that, whereas intellectual property rights are a response to the fact that, absence such protection, intellectual goods would be underproduced, they create in turn problems of "under-utilisation" – hence the limitations in duration and scope[25].

However, it is also true that some limitations derive from public policy considerations or fundamental rights. In a paper about copyright exemptions, great part of which is applicable to other intellectual property rights, Hugenholtz[26] stressed that, apart from reasons relating to market failures, exceptions could have their raison d'être on public interest or fundamental rights.

Overall, it can be stated that the framework of intellectual property rights is mainly dominated by the property rule, meaning that usually it is up to the right holder to freely decide whether he wants to dispose of the right or not. Still, the system of limitations or exceptions as it drafted – i.e., mandatory and independent of the right holder's consent – demonstrate that the liability rule is also present in what concerns intellectual property rights[27].

Importantly, the liability rule does not solely reflect efficiency considerations, but also justice ones[28]. Whereas the grant of a property right over an intellectual good

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[24] Coase 1960, p. 15.
[25] See Belleflamme 2008, p. 213.
[26] Hugenholtz 1997, pp. 10-14.
[27] For a clear and thorough explanation about property rules and liability rules, see Calabresi & Melamed 1972, pp. 1106 ff..
[28] *Eorundem*, p. 1110. The authors point out that "the choice of a liability rule is often made because it facilitates a combination of efficiency and distributive results which would be difficult to achieve under a property rule".

entails both efficiency and justice concerns[29], the exceptions or limitations to an intellectual property right comprise parts of each doctrine as well. Exceptions or limitations to the exclusive right are the expression of global justice, that is, justice in the society taken as a whole. It is no longer the place for a merit-based justice, which had its say upon the bestowal of the right. Here, merit-based justice finds its counter-balance: the well-being of certain members of a society who, despite not being able to claim any kind of merit, need special consideration.

It is noteworthy that this reasoning does not affect the strength the merit-based justice has regarding intellectual property rights. Merit-based justice relates to the right itself and to the reasons underlying its conferral. Yet, that does not imply that the scope of the right cannot be limited by other type of factors. Exceptions or limitations to the right are exactly an echo of other concerns, which range from preserving fundamental rights of the individual to defending the public interest. In a way, they are a valid method to humanise merit-based justice, while drawing its boundaries.

In light of the above, it is apparent that one cannot do without exceptions or limitations to intellectual property rights; they do not reflect the essence of merit-based justice, but they provide a necessary balance by taking into account certain needs and situations that should not be disregarded. Fairness in this context has a different meaning, not related to one's achievements or efforts, but instead to the well-being of other members of society.

More importantly, limitations or exceptions also serve to remind us that intellectual property rights are not quite able to do the job themselves – they need the equilibrium that the former provide to meet the efficiency and justice goals that were in the basis of their creation in the first place.

Problems arise, however, in the present state of affairs. Whereas in trademarks, patents or designs both spheres – the right holder's and the user's – remain largely untouchable, in copyright they are now facing a hand-to-hand fight, the right holder being able to control more uses and the user being able to copy works more easily. The dynamic nature of copyright's subjects demands a constant calibration and evaluation of the principles of justice and economic efficiency. Nevertheless, account should also be

[29] See *supra*, IV.

taken of recent – though not so problematically dynamic – problems regarding patents, especially pharmaceutical ones.

Where efficiency and global justice are falling short, there should be an effort to bring the system back to basics, i.e., to tune it with such principles. It is submitted that one way to do that would be to revise and strengthen the role played by limitations or exceptions.

Lastly, it must be pointed out that the unique combination of efficiency and fairness also with respect to the negative part of the right – i.e., its limits – leads to the conclusion that at least theoretically a balance between efficiency and fairness or justice can be attained. It remains to be assessed whether the legislature has in fact managed to do so competently, which is a task for further (and empirical) studies.

VI – CONCLUSION

In theory, the nature and characteristics of economic efficiency and social justice are greatly apart when the issue is attribution of rights. As the name indicates, economic efficiency implies an allocation of rights which complies with basic economic principles, namely the maximisation of welfare. Arguably, economic efficiency does not relate to justice concerns – for example, it might be efficient to allocate a certain right to a certain individual on the basis of the production of welfare that this attribution will generate, although such individual would not deserve that granting from a pure fairness perspective. Conversely, social justice is primarily concerned with fairness and equality between individuals[30].

This illusory conflict was deconstructed along the previous chapters. It is submitted that economics and social justice are compatible with regard to intellectual property rights, although their motives are distinct. Economics is concerned with efficiency – it is the production of goods, and the incentive to produce more goods, that lies in the core of economic theories. On the other hand, social justice concentrates on a just (which many times, but not always, will mean equal) distribution of resources.

[30] Irani (1981) p. 35

However, if one takes the merit-based justice as a valid standard for intellectual property rights, it is evident that both approaches work together towards the same goal. If a right is granted to the individual because of the result of his intellectual work, as a reward for his labour, there is a merit-based approach. But from the standpoint of economic theories it is conceivable that the same result is achieved, as it was established a priori that for that intellectual work that right was to be awarded, because of the incentive such grant represents.

Let us illustrate the previous thoughts with a practical example, by recalling the old tale of the carrot on a stick. A farmer, wanting to make a stubborn donkey to move, tied a carrot to a string and attached it to a stick. The carrot would then dangle in front of the donkey's nose, but never close enough to allow him to take a bite. As a result, the animal would start running to try and catch the carrot. The carrot is thus the incentive the donkey needs to move. Economic theory would probably call this scenario an efficient solution, as there is a certain welfare that is reached provided there is a proper incentive. Would basic principles of justice be willing to recommend such solution too? No, possibly not. But what would happen if the story ends with the donkey being fed the carrot, after having walked the distance required? Then an unbiased bystander would be likely to say that is only fair. Certainly one could claim that tricking the animal into moving was not fair in the first place. But if an *ex ante* action, forced by efficiency purposes, has taken place, justice can have an *ex post* intervention by upholding that the donkey should be given the carrot.

To sum up, economics and justice might converge. They are both reflected in the current intellectual property framework. Another different question is of course whether the latter is serving economics and justice well. According to the author of this chapter, it is not. To correct such deflection, a reshaping of the current limitations or exceptions to the exclusive intellectual property rights can be a valuable solution. More precisely, it is submitted that limitations or exceptions should be given more strength. Notably, this is in line with the merit-based justice, as the reward should not outdo the merit; otherwise, the system is perverted, inasmuch as it will not be possible to assess one's merit with basis on one's reward. And a perverted system will give rise to injustice, both globally and in terms of merit.

Finally, it should be noted that the purpose of this chapter was to assess the impact of social justice on intellectual property, and not to perform a judgment on whether intellectual property is efficient or just in the end. It was demonstrated that intellectual property addresses social justice and efficiency considerations alike. Again, whether it does it competently is another issue. But everything considered, in the field of intellectual property one must ponder whether we are not facing the best choice option in what social justice is concerned.

REFERENCES

Bainbridge, D. (2007).*Intellectual property* (6th ed.). Harlow: Pearson Longman.

Belleflamme, P. (2008). The patent system and the pharmaceutical sector. In A. Gosseries, A. Marciano & A. Strowel (Eds.), *Intellectual property and theories of justice* (pp. 141-159). London: Palgrave Macmillan.

Breyer, S. (1970). The uneasy case for copyright : a study of copyright in books, photocopies and computer programs. *Harvard Law Review, 84* (2), 281-351.

Calabresi, G. & Melamed, A.D. (1972). Property rules, liability rules and inalienability: one view of the cathedral. *Harvard Law Review, 85* (6), 1089-1128.

Coase, R. (1960). The problem of social cost. *Journal of Law and Economics, 3*, 1-44.

Demuijnck, G. (2008). Is P2P sharing an objectionable form of free riding?. In A. Gosseries, A. Marciano & A. Strowel (Eds.), *Intellectual property and theories of justice* (pp. 141-159). London: Palgrave Macmillan.

Dorff, M. (2002). Why welfare depends on fairness: a reply to Kaplow and Shavell. *California Law Review 75*, 847-899.

Fisher, W. (2001). Theories of intellectual property. http://cyber.law.harvard.edu/people/tfisher/iptheory.pdf.

Homem, A.B. (1998). Reflexões sobre o justo e o injusto: a injustiça como limite do Direito. *Revista da Faculdade de Direito da Universidade de Lisboa*, *39* (2), 587-650.

Hugenholtz, P.B. (1997). Fierce creatures: copyright exemptions: towards extinction?. http://www.ivir.nl/staff/hugenholtz.html.

Irani, K.D. (1981). Values and rights underlying social justice. In R.L. Braham (Ed.), *Social justice* (pp. 29-44). Boston: Martinus Nijhoff.

Jussawalla, M. (1992). *The economics of intellectual property in a world without frontiers: a study of computer software*. New York: Greenwood Publishing Group.

Kaufmann, W. (1970). Doubts about justice. In H.E.Kiefer & M.K. Munitz (Eds.), *Ethics and social justice* (pp. 52-74). Albany: State University of New York Press.

Kitch, E. (1977). The nature and function of the patent system. *Journal of Law and Economics 20* (2), 265-290.

Lane, J.-E. (1996). *Constitutions and political theory*. Manchester: Manchester University Press.

Locke, J. (1976). *The second treatise of government: an essay concerning the true original, extent and end of civil government and a letter concerning toleration* (3rd ed. rep.). Oxford: Basil Blackwell.

Miller, D. (1979). *Social Justice*. Oxford: Oxford University Press.

Moore, A. (2004). *Intellectual property and information control: philosophic foundations and contemporary issues*. New Brunswick: Transaction Publishers.

Muffatto, M. (2006). *Open Source: a multidisciplinary approach*. London: Imperial College Press.

Sunstein, C.R. (1997). *Free markets and social justice*. New York: Oxford University Press.

Ramello, G., & Silva, F. (2006). Appropriating signs and meaning: the elusive economics of trademark. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=936653

Salzberger, E. (2006). Exonomic analysis of the public domain. In L. Guibault & P.B. Hugenholtz (Eds.), *The future of the public domain: identifying the commons in information law* (pp. 27-58A). Alphen aan den Rijn : Kluwer Law International.

Strowel, A. (1993), *Droit d'auteur et copyright: divergences et convergences*. Brussels: Bruylant.

Thumm, N. (2000). *Intellectual property rights: national systems and harmonisation in Europe*. Heidelberg: Physica – Verlag.

Towse, R. (2001). *Creativity, incentive and reward: an economic analysis of copyright and culture in the information age*. Cheltenham: Edward Elgar.